IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-582

NORFOLK AND WESTERN RAILWAY COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, WALKER TOWING CORPORATION, HUFFMAN TOWING COMPANY, INLAND WATERWAYS, INC., FEDERAL BARGE LINES, INC. and INLAND TUGS CO.
Appellants,

v.

THE HONORABLE WILLIAM L. BEATTY, VICTOR J. MOSELE, JOHN GITCHOFF, HAROLD R. CLARK, JOSEPH J. BARR, FRED P. SCHUMAN, MOSES W. HARRISON, II and JOHN D. LAURENTI, Judges,
Appellees,

On Appeal From the United States District Court for the Southern District of Illinois, Southern Division

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JURISDICTIONAL STATEMENT

THE OPINIONS BELOW

The Opinion of the United States District Court for the Southern District of Illinois, Southern Division (App. A, infra. pp. A-1-A-5) has not yet been reported at the time this Jurisdictional Statement was printed.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) Appellants filed this action in the District Court for the Southern District of Illinois, Southern Division, seeking to enjoin appellees, the Judges of the Third Judicial Circuit Court of Madison County, Illinois from infringing their constitutional rights. Appellees are applying § 707, Ch. 110 A, Ill. Rev. Stats. to prohibit appellants from having specialist counsel, licensed in states other than Illinois, conduct the trial of suits brought against appellants, in the state court, by their employees in the exercise of rights created by federal statutes and admiralty and maritime law. This action was taken despite the fact that appellants had also employed, in the cases, Illinois licensed attorneys as local counsel, who appeared at all stages of the proceedings.

Federal jurisdiction is based on the existence of a federal question, 28 U.S.C. § 1331, and on diversity of citizenship, 28 U.S.C. § 1332. As an action to restrain, on constitutional grounds, state officers from enforcing a state statute, the proceeding is brought under the authority of 28 U.S.C. §§ 2281 and 2284.

(ii) The judgment or decision sought to be reviewed is the Order entered on July 2, 1975, by a three-judge court convened pursuant to 28 U.S.C. §§ 2281 and 2284, holding that § 707, Ch. 110 A, Ill. Rev. Stats. was not constitutionally deficient as applied to appellants. (App. A. infra pp. A-1-A-5) On May 10, 1975, an order had been entered that the three-judge court had jurisdiction. No post-judgment motions were filed. The Notice of Appeal (App. B. infra pp. A-6-A-10) was filed in the District Court for the Southern District of Illinois, Southern Division, on August 21, 1975.

(iii) Jurisdiction of this Court to review the decision of the federal court on direct appeal is conferred by 28 U.S.C. § 1253.

(iv) Cases sustaining the jurisdiction of this Court are:

Turner v. Fouche, 396 U.S. 346 (1970);

Flast v. Cohen, 392 U.S. 83 (1968);

City of Cleveland v. United States, 323 U.S. 329 (1945);

Query v. United States, 316 U.S. 486 (1942).

(v) The validity of § 707, Ch. 110 A, Ill. Rev. Stats., as applied to restrict and deny appellants the effective assistance of counsel of their choice, in defending suits brought to enforce rights under federal statutes, is here involved. The full text of that Section is as follows:

Illinois Revised Statutes, Chapter 110 A, Section 707: *("Supreme Court Rule 707). Foreign Attorneys in Isolated Cases.*

> "Anything in these rules to the contrary notwithstanding, an attorney and counselor-at-law from any other jurisdiction in the United States, or foreign country, may in the discretion of any court of this State be permitted to participate before the court in the trial or argument of any particular cause in which, for the time being, he is employed."

QUESTIONS PRESENTED BY THE APPEAL

For many years, a substantial number of suits asserting rights under federal statutes (The Federal Employers' Liability Act [F.E.L.A.] 45 U.S.C. § 51, et seq., The Safety Appliance Acts 45 U.S.C. § 1-50, The Merchant Marine Act of 1920, as

amended [Jones Act] 46 U.S.C. § 688) and under maritime law, have been brought against appellants in the Circuit Court of Madison County, Illinois, without regard to where the accident occurred, or the residence of the plaintiff. Under the law, the plaintiff has the option to sue in the state court of any state in which his employer does business; and the action may not be removed to the federal court. Appellants have been represented in such cases by specialist attorneys, licensed in states other than Illinois, to conduct the trial of such cases, with Illinois licensed attorneys employed as local counsel and appearing in court at all stages of the proceeding. This case arose when appellees, Judges of the Madison County Circuit Court, applying § 707, Ch. 110 A, Ill. Rev. Stats., struck the names of specialist, non-resident counsel as trial attorneys and ordered appellants to retain Illinois licensed attorneys who alone would actually try the cases.

The question presented is whether §707, Ch. 110 A, Ill. Rev. Stats, as applied to appellants in restricting and interfering with their right to the effective assistance of counsel of their choice, and with the right of such counsel, is in conflict with the Constitution of the United States, specifically:

1. The Supremacy Clause in ARTICLE VI, by attempting to regulate basic rights and impairing the uniformity of rights created by the federal statutes and maritime law?

2. The equal protection, due process and privileges and immunities clauses of the Fourteenth Amendment?

3. The Commerce Clause, ARTICLE I, Section 8, by laying an undue burden and discriminating against interstate commerce?

STATEMENT OF THE CASE

Appellants are two railroad and five barge line companies engaged in interstate commerce by rail and water in many states, including Illinois. Acts of Congress (Federal Employers' Liability Act [F.E.L.A.], 45 U.S.C. §51 et seq. and The Safety Appliance Acts, 45 U.S.C. §1-50) provide the railroad employees with federally created rights against the railroad appellants for job-related injuries; the rights of seamen employees against the barge line appellants are conferred by the Merchant Marine Act of 1920, as amended (Jones Act), 46 U.S.C. §688, and admiralty or maritime law. Concurrent jurisdiction is conferred upon federal and state courts (45 U.S.C. §56, 46 U.S.C. §688). Venue may be had wherever the defendant transacts business (*Pure Oil Co. v. Suarez*, 384 U.S. 202 [1966]; 45 U.S.C. §56). Actions filed in the state court may not be removed to the federal court (28 U.S.C. §1445(a)).

For many years, a substantial number of suits against appellants by employees to recover damages for injuries, have been filed in the Circuit Court for the Third Judicial Circuit, Madison County, Illinois. In a large number of such cases, the alleged accidents did not occur in Illinois. The plaintiff, the occurrence witnesses, and the treating or examining physicians were not residents of Illinois; and the hospital involved was not located in Illinois. Appellants are incorporated and have their principal offices in states other than Illinois. In fact, the only point of contact with the state of Illinois, in such cases, is that suit was filed in Madison County and service was obtained upon appellants in Illinois, because of their operations in interstate commerce.

Appellant railroads have retained certain lawyers specializing in F.E.L.A. matters, and the barge line appellants have retained specialist admiralty counsel to handle these cases. These lawyers maintain their offices in St. Louis, Missouri, which imme-

diately adjoins Madison County, Illinois. They are licensed to practice law by the state of Missouri and have been admitted to the bar of various federal district and appellate courts. They are not licensed to practice law by the State of Illinois, but appear and have appeared, in Illinois state courts only in connection with their railroad or admiralty specialties. Appellants have employed these attorneys to investigate the accident, evaluate the claims and advise regarding possible settlement; and, if necessary, to prepare and try the lawsuits. In every such suit, appellants have also employed lawyers, licensed by the state of Illinois to act as local counsel, to appear in court at all stages of the proceeding.

On March 19, 1975, appellees, Madison County Circuit Judges advised that, effective immediately, pursuant to §707, Chap. 110 A, Ill. Rev. Stats., appellants would be prohibited from using their specialist attorneys to conduct the trial in any pending case, including those already prepared by them and ready for trial. Appellants were ordered to employ Illinois licensed attorneys to try the cases.

On March 31, 1975, appellants filed in the United States District Court for the Southern District of Illinois, Southern Division, a complaint for injunction pursuant to §§2281 and 2284, 28 U.S.C., challenging the constitutionality of §707, Ch. 110 A, Ill. Rev. Stats., as applied by appellees. They prayed that a three-judge court be impaneled to hear the case; asked for a temporary restraining order; and that, thereafter, a preliminary injunction issue, restraining appellees from enforcing the above statute, as applied to appellants, pending final hearing; and that, on final hearing the injunction be made permanent and for further relief as appropriate.

Pursuant to notice, 28 U.S.C. §2284 (2), a hearing was held on March 31, 1975 before the Honorable Harlington Wood, Jr., District Judge, to determine whether or not a temporary

restraining order should be issued. The parties appeared through their attorneys and one of the appellees, Judge Beatty, testified. At the conclusion of the hearing, the court took the matter under submission.

On April 1, 1975, Judge Wood requested Chief Judge Fairchild of the United States Court of Appeals for the Seventh Circuit to appoint a three-judge court to consider the case. Judge Walter J. Cummings, Judge, United States Court of Appeals, Judge Robert D. Morgan, Chief Judge of the Southern District of Illinois, and Judge Harlington Wood, Jr. were appointed as judges of the three-judge court. Briefs were requested, and submitted by appellants, appellees, and two amici curiae, the Illinois State Bar Association and the County Bar Association of Madison County, Illinois, on the issue of whether or not the three-judge court had jurisdiction. The Madison County Bar Association had petitioned the court, on behalf of its two hundred five (205) members, to intervene on the ground, among others, that the "question is one of general and vital interest to the members of the Madison County Bar Association" and "* * * that the outcome of this case will materially affect the livelihood and quality of practice by the members of the Madison County Bar Association."

While the application for temporary restraining order was under submission, appellee Beatty, on April 21, 1975 struck the appearance of Joseph A. Murphy, a Missouri attorney, as attorney of record for the appellant Inland Tugs Co., in a lawsuit pending against said company. On April 23, 1975, Inland Tugs Co. filed a new motion for a temporary restraining order, which was denied by Judge Wood on May 1, 1975. Thereafter, on May 3, 1975, appellant railroads, and, on May 8, 1975, appellant barge lines filed their respective motions for an immediate hearing on the preliminary injunction.

On May 10, 1975, the three-judge court ruled that it had jurisdiction of the case. The Court further noted that the pend-

ing motions for preliminary injunction would be taken with the case on the merits. No hearing on appellants' motion for preliminary injunction was held.

On May 22, 1975, an answer was filed by appellees which admitted the essential factual allegations of the complaint. On July 2, 1975, the court entered its order denying the relief sought by appellants and granting, as if it had been filed, appellees' motion to dismiss. Appellants thereafter filed their Notice of Appeal to this court on August 21, 1975, within the time allowed by 28 U.S.C. §2101(b).

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL

This case, involving the imposition by a state of barriers against non-residents, raises important issues regarding the right to counsel of their choice of defendants in civil cases and the power of a state to prohibit or restrict participation of out-of-state specialist counsel, in cases asserting federally created rights. Under the guise of regulating the practice of law, Madison County Circuit Judges have barred appellants from having their specialist attorneys, licensed in states other than Illinois, conduct the trial of F.E.L.A. or Jones Act cases brought against them in the state court. No justification, other than the economic interest of the Madison County Bar, was suggested as a basis for appellees' action, which was taken notwithstanding:

(1) the fundamental unfairness to a civil defendant who does not choose the forum state, if he may not bring in the lawyer of his choice;

(2) the fact that appellants had also employed, as local counsel in every case, Illinois licensed attorneys, who appeared in court at all stages of the proceeding. Accordingly, the state's regulatory interest (in requiring knowledge of its practice and procedure, to assure the smooth administration of the state court system) was fully satisfied.

Unfortunately, state and local bar associations, particularly during periods of economic recession and concern over the impact of no-fault insurance on casualty litigation, encourage and perhaps stimulate restrictions of this type. They do so despite specific judicial reminders that "In the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse" (*Goldfarb v. Virginia State Bar*, 95 S. Ct. 2004, 2014 (1975); that the need "for specialized legal services frequently arises as to federal rights relating to such esoteric subjects as income taxation, patents, copyrights, trademarks and securities and labor regulation" (*Spanos v. Skouras Theatres Corporation*, 364 F.2d 161, 170 (2d Cir. 1966), as well as anti-trust, F.E.L.A., Jones Act, and admiralty matters; and the admonition of the American Bar Association in its Code of Professional Responsibility:

> "However the demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by the states. In furtherance of the public interest, the legal profession should discourage regulation that unreasonably imposes territorial limitation upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice." (Canon 3, EC 3-9).

Of course, it is easier to apprehend unfairness when a black complains that his constitutional rights have been violated by state action, than when a similar claim is made by a railroad or barge line company. However, if the Constitution is in-

deed color blind, its provisions are designed to protect the rights of corporate defendants, as well. Federal law permits railroad workers and seamen to sue their employers in any state in which they operate; but it does not thereby sanction rules by the forum states, restricting the right of the non-resident defendants to assistance by counsel of their choice.

Unless checked by this Court, the action taken by appellees will discourage specialization by lawyers who necessarily represent their clients in many states on federal matters, despite the growing need for expertise in trial of lawsuits; lead to reprisals by the bar associations in other states and balkanize the legal system, impede the handling and settlement of F.E.L.A., Jones Act and maritime claims; and discriminate against, and impose undue burdens upon, rail and water carriers in interstate commerce. The precedents established by this Court require reversal of the decision below.

1. **The Supremacy Clause: Federally Created Rights Are Governed by Federal, Not State Law. Appellees' Order Violates Article VI of the Constitution.**

The decisions of this Court make it clear that substantive rights under federal statutes and maritime law are governed by federal law and may not be altered by state law (*Garrett v. Moore-McCormack Co.*, 317 U.S. 239 [1942]; *Brown v. Western Railway of Alabama*, 338 U.S. 294 [1949]). As stated in the *Garrett* case, 317 U.S. 239, 244-245:

> "* * * The source of the governing law applied is in the national, not the state, governments. If by its practice the state courts were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the state would not enforce, but would actually deny, federal rights which

> Congress, by providing alternative remedies, intended to make not less, but more secure."

In Jones Act, maritime and F.E.L.A. cases, a state is not free to apply its rules of contributory negligence (*Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 [1953]; *Beadle v. Spencer*, 298 U.S. 124 [1936]; 45 U.S.C. §53), assumption of risk (*Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424 [1939]; 45 U.S.C. §54); statute of limitations (*McAllister v. Magnolia Petroleum Company*, 357 U.S. 221 (1958); 45 U.S.C. §56); statute of frauds (*Kossick v. United Fruit Co.*, 365 U.S. 731 [1961], or its doctrines in testing the validity of releases. (*Garrett v. Moore-McCormack Co.*, 317 U.S. 239 [1942]; *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359 [1952]. In fact, this Court has held that a state court cannot apply strict local rules of pleading or practice to impair the right of a railroad worker to recover in a F.E.L.A. action. (*Brown v. Western Railway of Alabama*, 338 U.S. 294 [1949]).

Surely, if a state lacks power to burden or impair a federal right by applying its rules of pleading to measure the adequacy of a Jones Act or F.E.L.A. complaint, its statute of frauds to nullify an oral agreement, its statute of limitations to outlaw a suit, or its legal doctrines to determine the validity of a release, it does not have the authority to prohibit a Jones Act or F.E.L.A. plaintiff or defendant from having his case tried by counsel of his choice, particularly when attorneys licensed in the forum state have been employed as local counsel. In a legal system, adversary in nature such as ours, where rights can be waived or lost unless asserted in a timely and effective manner, the right to counsel—essential for the protection of other rights—may well be the most basic right (*Powell v. Alabama*, 287 U.S. 45, 68-69 [1932]; *Gideon v. Wainwright*, 372 U.S. 342 344-345 [1963]). By prohibiting appellants' specialist counsel from trying cases and ordering appellants to employ Illinois licensed attorneys to try such cases, appellees have infringed appellants' substantive federal rights.

Appellants' out-of-state specialist counsel appear in many F.E.L.A. and Jones Act cases in the Madison County Circuit Court, not because they seek to deprive members of the Madison County Bar of their livelihood, but because this is a favorite plaintiff's forum. Although non-resident counsel may be termed "foreign" attorneys, at least under our federal system, they should not be treated as hostile invaders, fair targets for attack. When the enjoyment of rights created by an Act of Congress is impeded by the law of any state, the state rule must yield.

2. **Specialist Counsel Render Important Legal Services for Appellants.**

If appellees had applied § 707, Ch. 110A, Ill. Rev. Stats., to prohibit out-of-state counsel of plaintiff's choice from trying an F.E.L.A. or Jones Act case, there is little question but that such action would be held invalid—either as an impairment of a basic federal right or as a violation of Fourteenth Amendment rights. In a series of decisions, this Court has frustrated the efforts of states, acting by their state bar associations to regulate or restrict the selection of attorneys for injured claimants. (*United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 [1971]; *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217 [1967]; *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 [1964]; see also *N.A.A.C.P. v. Button*, 371 U.S. 415 [1963]).

(A) **The Role of Counsel for Appellants.**

Assistance of counsel is no less important to an F.E.L.A. or Jones act defendant than to a plaintiff. Congress has made rail and water carriers subject to a system of federally created rights. Under these statutes, they are subject:

(1) To suit by employees in a state court, in any state in which they operate. Some of appellants can be sued in any one of more than twelve (12) states as a result of the same accident.

(2) To trial by jury, with sweeping federal changes in common law concepts of negligence and burden of proof requirements. Assumption of risk, contributory negligence and the fellow servant doctrine are not available as defenses.

(3) To liability virtually without fault in certain types of claims, such as violation of the Safety Appliance Act and unseaworthiness.

It is a matter of common knowledge that a jurisdiction with a reputation for high jury verdicts attracts an increased volume of personal injury suits. This Court has noted the history of this development as it related to the pattern of regional attorneys selected by the Brotherhood of Railroad Trainmen in F.E.L.A. cases. (*Brotherhood of Railroad Trainmen v. Virginia, ex rel. Virginia State Bar*, 377 U.S. 1 [1964]; *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 [1971]). A growing number of F.E.L.A. and Jones Act suits has been filed against appellants in the Madison County Circuit Court in recent years.

In this situation, it has become increasingly important for appellants to promptly obtain the services of specialist F.E.L.A. or admiralty counsel. Retained often shortly after the casualty occurs and before suit is filed, they investigate the accident, evaluate the claim, and advise regarding, or handle, settlement negotiations. If suit is filed, they represent appellants, prepare and try the cases. So that state court procedures will be followed, attorneys licensed in the forum state are employed as local counsel and appear in court—along with specialist counsel—at all stages of the proceeding.

Appellants and their out-of-state attorneys have not invaded Madison County in search of a favorable forum. They are

brought there in response to suits filed by plaintiffs who could instead have filed the suits in Missouri, Louisiana, Kentucky, Arkansas, or any other state in which appellants do business. Until the suit is filed, appellants do not know what forum the plaintiff will select or, in fact, whether litigation will result. Many claims are settled with the assistance of specialist counsel.

(B) The Consequences of Application of § 707, Ch. 110 A, Ill. Rev. Stats.

The financial and frictional impact of appellees' action is manifest. If Illinois has the power as a forum state, to prohibit out-of-state lawyers from trying F.E.L.A. and Jones Act-Maritime lawsuits, every other state has the same authority as to such suits filed in that state.

Moreover, trial of a lawsuit is only one aspect of the legal services rendered in a lawsuit. Frequently, particularly in the many cases in Madison County filed by nonresident plaintiffs, for accidents which occurred in other states, depositions must be taken, witnesses interviewed and hospital records obtained in those other states. If appellees are permitted to apply § 707 as they wish, each state where legal services are performed, in a suit filed in Madison County, can require that only lawyers licensed in that state can take the depositions or perform the other legal services involved.

Perhaps, the state or local bar associations of other states would welcome such restrictions on out-of-state lawyers as "materially affecting the livelihood" of their members as has the Madison County Bar Association. However, as a matter of social policy in a federal system, such a balkanizing process demeans the profession, brings discredit upon the j dicial system, requires change of counsel, increases the cost and prevents clients from obtaining the quality of legal service to which they are entitled.

3. The Parties in Civil Cases Involving Federal Rights Are Entitled, Under the Constitution, to Assistance of Counsel of Their Choice.

There is a pressing need for clarification of the rights of clients to counsel of their choice and of the power of a state to regulate the practice of law in cases involving federal rights. Of course, this Court has spoken on the subject; in *Powell v. Alabama*, it said:

> "If in any case, civil or criminal a state or federal court were arbitrarily to refuse to hear a party by counsel employed by and appearing for him, it reasonably may not be doubted that such refusal would be a denial of a hearing and therefore, of due process in the constitutional sense." (287 U.S. 45, 69 [1932]).

This statement and the sweeping language in *Glasser v. U. S.*, 315 U.S. 60, 70 (1942):

> "the right to the assistance of counsel is so fundamental that denial by a state court of a reasonable time to allow the selection of counsel of one's own choosing may so offend our concepts of the basic requirements of a fair hearing as to amount to a denial of due process of law"

have led federal courts to extend the Sixth Amendment right to counsel to include the right to retain counsel not authorized to practice in the district where trial was held (*U.S. v. Bergamo*, 154 F.2d 31 (3rd Cir. 1946); and to hold that a federal district court may not refuse to accept defendants' removal petition because it was not signed by a member of the Mississippi bar. (*Lefton v. City of Hattiesburg*, 333 F.2d 280 (5th Cir. 1964)). Said the court:

> "Moreover, where local counsel are associated in the case to comply with court rules, non-local counsel chosen by the

parties may nevertheless take the lead in the direction and argument of the case." (at p. 285)

In the area of civil cases, this Court has limited the power of states to regulate the practice of law and prohibit unauthorized practice, notwithstanding their interest in the conduct of the professions within their boundaries. State procedures for admission to practice and disbarment must be relevant to the qualifications involved and must not encroach upon the attorney's first amendment privileges (See *Konigsberg v. State Bar*, 353 U.S. 252 [1957]; *Schware v. Board of Bar Examiners*, 353 U.S. 232 [1957].) In *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963), Virginia was restrained from prosecuting the Legal Defense Fund under laws prohibiting solicitation of legal business.

Moreover, this Court refused to permit the application of state laws forbidding solicitation and unauthorized practice to a labor union program of recommending attorneys to members and their families. (*United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 [1971]; *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217 [1967]; *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 [1964]. As the Court stated in *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 7:

> "A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest, and . . . of course, lawyers accepting employment under this constitutionally protected plan have a like protection which the State cannot abridge."

The "lawsuits authorized by Congress to effectuate a basic public interest" were, of course, F.E.L.A. claims, the same federal rights involved in this case. The union plan which was protected involved a system of regional or out-of-state counsel for

the claimants, a Chicago attorney for example representing defendants in Michigan and several other states.

From these decisions there emerges the general principle that state regulation of the legal profession is invalid "whenever it impedes the vindication of substantive federal rights" (Note, *Retaining Out-of-State Counsel: The Evolution of a Federal Right*, 67 Colum. L. Rev. 731, 740).

In *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161, cert. denied, 385 U.S. 987 (1966), the majority of the Second Circuit (7-2) en banc held that there was a constitutional right to the assistance of an out-of-state specialist attorney, associated with local counsel, in connection with a federal right of action. The court upheld the right of a California attorney to recover for legal services performed in New York in an anti-trust suit, despite a state law condemning the unlicensed practice of law, Judge Friendly's opinion for the court stated (at p. 170):

> "We are persuaded, however, that where a right has been conferred on citizens by federal law, the constitutional guarantee against its abridgement must be read to include what is necessary and appropriate for its assertion. In an age of increased specialization and high mobility of the bar, this must comprehend the right to bring to the assistance of an attorney admitted in the resident state a lawyer licensed by 'public act' of any other state who is thought best fitted for the task, and to allow him *to serve in whatever manner is most effective*, subject only to valid rules of courts as to practice before them." (emphasis ours.)

The court added (pp. 170-171):

> "If a corporation operating across state lines wishes a particular lawyer or firm of lawyers to supervise the handling of all its problems in one of such fields, we do not see how a state can constitutionally insist that a local manager come

to the expert, bearing bales of papers with him, rather than vice versa."

The court held that, under the privileges and immunities clause of the Constitution, New York could not prohibit an out-of-state attorney from rendering legal services within the state on a federal claim or defense; nor prevent his client from retaining him in association with an in-state lawyer.

4. **Section 707, Chap. 110A, Ill. Rev. Stats., as Applied by Appellees, Violates the Constitutional Rights of Appellants and Their Counsel.**

The court below rendered the order appealed from by granting a motion to dismiss appellant's complaint, as though such a motion had been filed. Accordingly, appellants are entitled to have the allegations of their complaint taken as true. The statement of the case, set forth above, includes these allegations, among others, which were admitted by appellees' answer:

(1) that appellants, defendants in many cases asserting federal rights and claiming damages in substantial amounts, have been prohibited by appellees from having the trial of such cases conducted by their out-of-state specialist attorneys, who have been trying such cases for many years, with in-state attorneys as local counsel.

(2) that appellants have been ordered to obtain Illinois licensed counsel to try such cases, and to proceed to trial, with specialist counsel (who have already prepared some of the cases for trial) being permitted to sit at the counsel table but without the right to address the court or jury.

(3) that there has been no suggestion of misconduct on the part of appellants' counsel. In fact, the contrary appears from the testimony of appellee, Judge Beatty, at the hearing on March 31, 1975.

(4) that appellees' order applied §707, Ch. 110 A., Ill. Rev. Stats. to bar appellants' specialist counsel from participating in trials. The statute gave appellees discretion for participation in trial by an out-of-state attorney, only in isolated cases; and some of appellants' counsel were counsel of record in twenty to thirty cases at the same time" (Answer, par. 23).

(A) The statute, as applied, violates the equal protection clause of the Fourteenth Amendment:

There has been no showing of substantive evils flowing from the activities of appellants' specialist counsel required to support the state's regulatory interest and justify the broad prohibition which appellees have imposed. (*N.A.A.C.P. v. Button, supra*). When the question litigated is federal, as here, the state's legitimate interest—in requiring knowledge of state practice and procedure and providing an attorney on whom all papers and orders can be served (to assure smooth administration of the state court system)—is completely satisfied by the employment by appellants, of Illinois-licensed attorneys as local attorneys. The ban on out-of-state counsel trying the case "would only be necessary to fulfill the parochial desire to eliminate outside competition." (Note, *Retaining Out-of-State Counsel: The Evolution of a Federal Right*, 67 Colum. L.Rev. 731, 750 (1967).

This court has held that a state cannot infringe, in any way, the right "to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest". Accordingly, states have been denied power to regulate or restrict the selection of attorneys for F.E.L.A. plaintiffs. (*United Transportation Union v. State Bar of Michigan, United Mine Workers v. Illinois State Bar Association; Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar, supra.*)

To permit the denial of the right of F.E.L.A., Jones Act and maritime defendants to have out-of-state counsel of their choice try cases brought against them, while so protecting the right of plaintiffs, is to establish a classification "without any reasonable basis", in violation of the equal protection clause of the Fourteenth Amendment. Since the challenged law directly impinges the exercise of a "fundamental" personal right (to the assistance of counsel of one's choice), the state must show that the law is necessary to promote a compelling governmental interest (*Dunn v. Blumstein*, 405 U.S. 330, 335, 342 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). None has been shown.

It will not do to suggest, as did the court below, that there is no real interference since out-of-state counsel are not completely barred at trial; their participation is simply limited—they can be in court but cannot talk to the court or jury. Although there are occasions in court when both wisdom and a client's interest suggest silence, counsel whose voice is stilled, whether by laryngitis or court order, is not an advocate at trial.

A classification which protects F.E.L.A. or Jones Act plaintiffs, but not defendants, has no rational basis relevant to the purpose for which the classification is made. (*Rinaldi v. Yeager*, 384 U.S. 305 [1966]). Moreover, section 707 establishes other irrational classifications, as well. As applied by appellees, out-of-state counsel may be permitted to try an isolated case; but there is no discretion vested in the court to permit appellants' counsel, who have been trying such cases in Madison County for many years, and against whom there has been no suggestion of misconduct, impropriety or lack of qualification. However, in terms of the legitimate interest of the state in the qualifications of counsel, if any distinction should be made between the two groups of out-of-state counsel, appellants' counsel should be entitled to preference.

Appellants' counsel, thus far, are barred by appellees only from trying the cases, but not from rendering other legal services in Illinois in connection therewith. Again, the basis for classification of services fails. If the state has any relevant disciplinary interest in guarding against professional misconduct, the court is in a far better position to observe, supervise, and punish misconduct in its presence at trial than at any other time.

Since §707, as applied by appellees establishing classifications without any reasonable basis, appellants' right to equal protection of the law has been denied.

(B) The statute, as applied, violates the due process clause of the Fourteenth Amendment.

The right to counsel in civil litigation is basic to the guarantee of a fair hearing. As noted, this Court, in *Powell v. Alabama*, 287 U. S. 45, 69 (1932), asserted that "it reasonably may not be doubted" that arbitrary refusal "in any case, civil or criminal," of a state or federal court to hear a party by counsel of his choice would be a denial of a hearing and of due process. A fair hearing is denied in criminal cases, when out-of-state counsel of defendant's choice is excluded without substantial justification. (*U. S. v. Bergamo*, 154 F.2d 31 (3rd Cir 1946); and the same rule should apply in civil cases under laws of the United States, particularly with regard to the civil defendant who does not choose the forum state.

This is the situation of appellants, who are sued in Madison County because their employees, under federal law, may choose counsel from other states and sue them wherever they operate. Frequently, they prefer this forum. Fundamental fairness is denied a party forced to litigate in another state, if he cannot bring in the lawyer of his choice to represent him in whatever

fashion he deems best. Since appellants, in every case, have retained a member of the Illinois bar as local counsel and have, in this manner, satisfied the proper interest of the state, "due process should require the admission of nonlocal counsel who is associated with a local attorney . . . in state court-federal question litigation". (Note, *Retaining Out-of-State Counsel: The Evolution of a Federal Right*, 67 Colum. L.Rev. 731, 750 [1967]). The arbitrary refusal of appellees to permit appellants' specialist counsel to try F.E.L.A. and Jones Act cases brought against appellants in Madison County and the order (requiring the employment of new trial counsel for cases already prepared for trial by out-of-state counsel, involving duplication, waste and additional expense), deprives appellants of due process under the Fourteenth Amendment.

(C) **The statute, as applied, violates the privileges and immunities of appellants and their specialist counsel.**

In *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161 (2nd Cir. 1966), discussed above, the Second Circuit en banc refused to apply a state law restricting out-of-state attorneys on the ground that such counsel were "necessary and appropriate" for the assertion of a federal right in anti-trust litigation. Therefore, there was a privilege and immunity safe-guarded by the Fourteenth Amendment. Since the need of appellants for out-of-state counsel is also tied to a federal claim and defense, under the decision in the *Spanos* case, the privileges and immunities of appellants and their specialist counsel, guaranteed by the Fourteenth Amendment, have been violated by § 707, as applied by appellees. The rights of the attorneys may be asserted by appellants in this proceeding. (*Griswold v. Connecticut*, 381 U.S. 479 [1965], *Truax v. Raich*, 239 U.S. 33 (1915)).

5. **The Statute, as Applied, Lays an Undue Burden on Interstate Commerce, in Violation of Article I § 8.**

In *Goldfarb v. Virginia State Bar*, 95 S. Ct. 2004 (1975), this Court held that performance of legal services, examining a land title, in exchange for a fee is commerce; and noted that, in the modern world, such activities by lawyers play an important part in commercial intercourse.

Of course, appellants, rail and water carriers, are directly involved in interstate commerce. The statute, as applied by appellees, bars appellants from having cases tried by out-of-state counsel who have already prepared some of the cases for trial. It requires appellants to employ locally licensed attorneys to try such cases, involving claims of employees in interstate commerce. In so doing, an undue burden is placed on interstate commerce, in violation of the Constitution. (*Pike v. Bruce Church, Inc.*, 397 U.S. 137 [1970]).

6. **The Opinion Below.**

There are serious issues in this case, which deserve careful consideration. It is submitted, with deference, that a reading will disclose that the opinion below falls far short of that standard. Granted, lawyers rarely, if ever, regard adverse rulings as models of the judicial craft. However, consider the fact that:

(1) The decisions of this Court in *N.A.A.C.P. v. Button*, *Brotherhood of Railroad Trainmen v. Virginia*, *United Mine Workers v. Illinois State Bar Association and United Transportation Union v. State Bar of Michigan, supra*, were cited and discussed at length in the briefs filed by appellants. The opinion below does not discuss, or even mention, those cases (which contain perhaps the most authoritative pronouncements by this Court, restricting the power of states to impair federal rights

under the guise of regulating the practice of law), but, instead preferred to rely upon the dissenting opinion of one member of a three-judge court in the United States District Court for Connecticut, in a case which did not involve federal rights.

(2) Appellants cited, in their briefs below, the many decisions of this Court, holding that substantive rights under federal statutes and maritime law cannot be altered or impaired by state law. (*Garrett v. Moore-McCormack Co., Pope & Talbot, Inc. v. Hawn, Beadle v. Spencer, Socony-Vacuum Oil Co. v. Smith, McAllister v. Magnolia Petroleum Company,* and *Kossick v. United Fruit Co., supra*).

The opinion below does not discuss or even mention those decisions. Instead, it relies for authority upon the one case cited on this point by amici curiae, *Missouri ex rel. Southern Ry. Co. v. Mayfield,* 340 U.S. 1 (1950). As the opinion below notes: "No brief on the merits has been filed for defendants by the Attorney General of Illinois who had previously appeared in their behalf." The *Mayfield* case simply holds that a state court is not required to grant a motion to dismiss, under the doctrine of forum non conveniens, an F.E.L.A. suit filed by a non-resident for an injury which occurred in another state. The state court can proceed to hear the case on the merits.

Of course, state procedure applies in F.E.L.A. and Jones Act cases, so long as substantive rights are not impaired; and no one was arguing to the contrary. That is why appellants employed Illinois licensed attorneys as local counsel in every case. However, it is difficult to understand how the *Mayfield* case (that a state court is free to hear a case or not) is applicable to the severe limitations upon the right of appellants to assistance of counsel of their choice, imposed by appellees; and that the other decisions (dealing with impairment of substantive rights), were not even deserving of mention.

(3) The only other case referred to in the opinion below was *Spanos v. Skouras Theatres Corporation, supra.* Appellants relied upon the majority opinion in which seven judges joined. The opinion of the court below prefers to rely upon the two judge dissent.

Finally, the opinion below suggests "the desirability of a more liberal exercise of discretion" by appellees, and concludes that "the Illinois statute is not unreasonable":

> "Nor in the present Madison County cases is the participation of out-of-state attorneys completely barred. They may be present and participate with local counsel, though that participation is limited."

Appellants' out-of-state counsel may be present in Court at trial. They can do everything except speak out loud to the court or jury! By the same reasoning, the N.A.A.C.P. in the *Button* case or the labor unions, in the *United Transportation Union, United Mine Workers* and *Brotherhood of Railroad Trainmen* cases, might have been admonished by this Court that the state statutes involved were not unreasonable because the penalties prescribed for solicitation did not include capital punishment.

CONCLUSION

This appeal raises issues of fundamental importance and far-reaching effect, regarding right of defendants to employ counsel of their choice in civil cases involving federal rights, and the power of states to restrict the participation of out-of-state counsel. Appellants, their requests for temporary relief having thus far been denied, are now being required to employ Illinois-licensed trial attorneys and to proceed to trial in F.E.L.A. and Jones Act cases in the Madison County Circuit Court. For the reasons stated, the questions presented in this appeal are so sub-

APPENDIX A

In the United States District Court
Southern District of Illinois—Southern Division

Norfolk and Western Railway Company, et al., Plaintiffs, v. The Honorable William L. Beatty, Judge, et al., Defendants.	A-Civ-75-0033.

Order

Pursuant to Sections 2281 and 2284, Title 28 of the United States Code, Plaintiffs have challenged the constitutionality of § 707, Chapter 110A of the Illinois Revised Statutes as applied to them by the Defendants so as to limit the participation of Plaintiffs' out-of-state attorneys in pending litigation in the Circuit Courts of Madison County, Illinois. The Plaintiffs' attorneys are licensed to practice law in the State of Missouri, but not in the State of Illinois. They specialize in F.E.L.A. and Jones Act cases and appear from time to time together with local Illinois counsel, on behalf of Plaintiffs to defend Plaintiffs as defendants in numerous cases pending in the state courts of Madison County, Illinois. Defendants have directed Plaintiffs to secure attorneys licensed to practice law in Illinois to serve as their principal counsel in those pending cases. In some instances, Defendants have entered orders striking the names of the out-of-state attorneys of Plaintiffs as counsel of record. These directions and orders, however, permit the out-of-state counsel of Plaintiffs to

be associated in the cases with local counsel, but only in a supporting, consulting or advisory role at trial. They are not prohibited from giving legal or tactical advice before or during the course of litigation or participating in pretrial discovery.

The statute in question, referred to by Defendants as Supreme Court Rule 707, provides that an attorney from any other jurisdiction may, in the discretion of the court, be permitted to participate in the trial or argument of a particular case notwithstanding the general requirements for admission to the Illinois Bar as a prerequisite to practice in the courts of this state. In addition to this rule permitting admission *pro hac vice*, the State also has rules concerning the admission of attorneys seeking their initial license to practice law, and for those seeking to be admitted upon foreign license.

The merits of the issue have been briefed by the parties and the Court has had the benefit of the briefs of the Illinois State Bar Association of Madison County as *amici curiae*. No brief on the merits has been filed for Defendants by the Attorney General of Illinois who had previously appeared in their behalf.

Supreme Court Rule 707 is akin to a statute and is treated as such. The word "statute" as used in § 2281, Title 28, "is a compendious summary of various enactment by whatever method they may be adopted, to which a State gives her sanction," and is construed here to include Rule 707. *American Federation of Labor v. Watkins*, 327 U.S. 582 (1945).

Plaintiffs rely primarily on *Spanos v. Skouros Theatres Corporation*, 364 F.2d 161 (2d Cir. 1966). That case involved a Sherman Act suit in a federal court, and permitted an out-of state attorney, not admitted in that state or district, to collect for his legal services rendered in the case. As the constitutionality of a state statute or Supreme Court rule regulating the practice of law in the state was not challenged, the case is thus distinguishable. Further, some of the language from the opinion relied upon by Plaintiffs was not necessary to the decision of that issue.

In dissenting from the majority opinion, Chief Judge Lumbard states:

> "The opinion of the majority would seem to reduce to zero the power of any court in New York, state or federal, to exercise any control over who practices law in New York when the legal advice sought concerns a 'federal claim or defense', a test which is broad enough to include almost anything in these days of ever-burgeoning federal jurisdiction. Surely it cannot be seriously questioned that courts ought to have the power to regulate who practices before them for their own protection and that of litigants." 364 F.2d at 172.

In *Silverman v. Browning*, 359 F.Supp. 173 (1972), affirmed 411 U.S. 941, the Plaintiffs sought to employ an out-of-state attorney to appear in their behalf *pro hac vice* in civil litigation in a Connecticut state court, but the admission of the out-of-state attorney to represent Plaintiffs was denied under a statute similar to that of Illinois. The majority abstained, but retained jurisdiction pending final determination of the matter of admission by the Supreme Court of that state. The majority disagreed as to their reasons for abstaining, and Smith, Circuit Judge, dissented. In his dissent, Judge Smith stated:

> "The admission to practice before the State Courts in ordinary civil actions before them is a matter for those courts with which we should not unnecessarily interfere."

The dissent goes on to suggest "that a more liberal admission policy more in tune with modern specialization and mobility may be desirable", but that there is a matter for the state to determine. No constitutional basis is found "to grant a civil litigant,

patient or other client the right to compel the admission of non-residents to the practice of law, medicine, or other profession within a state".

Since state rules on *forum non conveniens* govern in F.E.L.A. and Jones Act matters, by analogy state procedure should control here. *Missouri ex rel. Southern Ry. v. Mayfield*, 340 U.S. 1 (1950).

The Illinois statute is not unreasonable. It is not a complete bar to out-of-state lawyers, but permits their full participation in isolated cases on a case-by-case determination. Nor in the present Madison County cases is the participation of out-of-state attorneys completely barred. They may be present and participate with local counsel, though that participation is limited.

That the cases are of federal origin, that the Plaintiffs' attorneys have been permitted to appear without limitation numerous times in the past, that the cases are presently being prepared for trial, that the Plaintiffs' attorneys are specialists regularly representing Plaintiffs in Madison County and elsewhere, that Plaintiffs in the state cases have freedom to select the forum of their choice, that the accidents involved occurred elsewhere, that Plaintiffs' attorneys have caused no disciplinary problems, are not factors singly or cumulatively which require that the Illinois statute be found constitutionally deficient. To view it otherwise would be for this Court to create a limited federal or national bar and to impose it on the states. To do so would be in total disregard of the state's great interests in the control and supervision of the practice of law in its own courts through reasonable requirements for licensing and admission. As suggested by the dissent in *Silverman*, such factors may, however, suggest the desirability of a more liberal exercise of discretion by the judges under the present Illinois statute, or a modification of that statute to fit circumstances such as these, but those matters are considerations for the state and not this Court.

The relief sought by Plaintiffs is denied, and the Defendants' Motion to Dismiss is allowed.

Enter this 2nd day of July, 1975.

/s/ WALTER J. CUMMINGS
Judge, United States Court of Appeals

/s/ ROBERT D. MORGAN
Chief Judge, United States District Court

/s/ HARLINGTON WOOD, JR.
Judge, United States District Court

APPENDIX B

United States District Court
For the Southern District of Illinois
Southern Division

A-Civ-75-0033

Norfolk and Western Railway Company, a corporation; Missouri Pacific Railroad Company, a corporation; Walker Towing Corporation, a corporation; Huffman Towing Company, a corporation; Inland Waterways, Inc., a corporation; Federal Barge Lines, Inc., a corporation, and Inland Tugs Co., a corporation,

Plaintiffs,

v.

The Honorable William L. Beatty, Judge; The Honorable Victor J. Mosele, Judge; The Honorable John Gitchoff, Judge; The Honorable Harold R. Clark, Judge; The Honorable Joseph J. Barr, Judge; The Honorable Fred P. Schuman, Judge; The Honorable Moses W. Harrison, II, Judge; The Honorable John De Laurenti, Judge,

Defendants.

Notice of Appeal to The Supreme Court of the United States

Notice is hereby given that Norfolk and Western Railway Company, Missouri Pacific Railroad Company, Walker Towing Corporation, Huffman Towing Company, Inland Waterways, Inc., Federal Barge Lines, Inc., and Inland Tugs Co., plaintiffs herein, within the time allowed by law under 28 U.S.C.A.

§ 2101(b), hereby appeal to the Supreme Court of the United States from the final judgment dismissing plaintiffs' complaint entered by a three-judge district court in this action on July 2, 1975, which judgment also denied plaintiffs' prayer for injunctive relief. This appeal is taken pursuant to Title 28 U.S.C. Section 1253, permitting direct appeals to the Supreme Court of the United States from orders of a three-judge district court denying, after notice and hearing, an interlocutory or permanent injunction.

Dated this 20th day of August, 1975.

NORFOLK AND WESTERN RAILWAY COMPANY, MISSOURI PACIFIC RAILROAD COMPANY

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And /s/ STEPHEN M. SCHOENBECK

And /s/ ROBERT J. COONEY
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Appellants

Proof of Service

We, Robert J. Cooney, one of the attorneys for Norfolk and Western Railway Company and Missouri Pacific Railroad Company, appellants herein, and a member of the Bar of the Supreme Court of the United States, and William G. Guerri, one

of the attorneys for Federal Barge Lines, Inc. and Huffman Towing Company, Inc., appellants herein, and a member of the Bar of the Supreme Court of the United States, and Joseph A. Murphy, one of the attorneys for Inland Tugs Co., appellant herein, and a member of the Bar of the Supreme Court of the United States, and Elmer Price, one of the attorneys for Walker Towing Corporation and Inland Waterways, Inc., appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 20th day of August, 1975, served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties thereto, as follows:

On The Honorable William L. Beatty, Judge; The Honorable Victor J. Mosele, Judge; The Honorable John Gitchoff, Judge; The Honorable Harold R. Clark, Judge; The Honorable Joseph J. Barr, Judge; The Honorable Fred P. Schuman, Judge; The Honorable Moses W. Harrision, II, Judge, and The Honorable John De Laurenti, Judge, defendants, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record as follows: The Honorable William J. Scott, Attorney General of Illinois, 500 South 2nd Street, Springfield, Illinois 62705; and Tom Price, Assistant Attorney General of Illinois, 500 South 2nd Street, Springfield, Illinois 62705;

On the County Bar Association of Madison County, Amicus Curiae, by mailing copies in duly addressed envelopes, with first class postage prepaid, to its respective attorneys of record as follows: Gerald B. Cohn, 1 Airport Plaza, Bethalto, Illinois 62010, and Robert B. Maucker, 401 Alton Street, Alton, Illinois 62002;

On the Illinois State Bar Association, Amicus Curiae, by mailing copies in duly addressed envelopes, with first class postage prepaid, to its respective attorneys of record as follows:

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Supreme Court, U. S.
FILED
NOV 17 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-582

NORFOLK AND WESTERN RAILWAY COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, WALKER TOWING CORPORATION, HUFFMAN TOWING COMPANY, INLAND WATERWAYS, INC., FEDERAL BARGE LINES, INC. and INLAND TUGS CO.

Appellants,

vs.

THE HONORABLE WILLIAM L. BEATTY, VICTOR J. MOSELE, JOHN GITCHOFF, HAROLD R. CLARK, JOSEPH J. BARR, FRED P. SCHUMAN, MOSES W. HARRISON, II and JOHN D. LAURENTI, Judges,

Appellees.

On Appeal From The United States District Court For The Southern District Of Illinois, Southern Division

MOTION TO DISMISS, OR IN THE ALTERNATIVE TO AFFIRM

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Ill. Rev. Stats., 1973, Ch. 110A, § 756 .....3, 4
28 U.S.C. § 1253 5
45 U.S.C. § 51 et seq. 4
46 U.S.C. § 688 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-582

NORFOLK AND WESTERN RAILWAY COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, WALKER TOWING CORPORATION, HUFFMAN TOWING COMPANY, INLAND WATERWAYS, INC., FEDERAL BARGE LINES, INC. and INLAND TUGS CO.

Appellants,

vs.

THE HONORABLE WILLIAM L. BEATTY, VICTOR J. MOSELE, JOHN GITCHOFF, HAROLD R. CLARK, JOSEPH J. BARR, FRED P. SCHUMAN, MOSES W. HARRISON, II and JOHN D. LAURENTI, Judges,

Appellees.

On Appeal From The United States District Court For The Southern District Of Illinois, Southern Division

---

MOTION TO DISMISS, OR IN THE ALTERNATIVE TO AFFIRM

The appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, respectfully move this Honorable Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the United States District Court for the Southern District of Illinois, Southern Division, on the grounds that it is manifest that the questions on which the decision of the cause depends are so insubstantial as not to require any further argument and that the decision rendered below is so obviously correct as to warrant no further review.

I.

THE NATURE OF THE CASE

A. Illinois Supreme Court Rules 707 and 756.

This appeal involves the constitutionality of Illinois Supreme Court Rule 707, Ill. Rev. Stat., 1973, ch. 110A, § 707, as applied to appellants. Rule 707 provides:

707. (Supreme Court Rule 707). Foreign Attorneys in Isolated Cases

> Anything in these rules to the contrary notwithstanding, an attorney and counselor-at-law from any other jurisdiction in the United States, or foreign country, may in the discretion of any court of this State be permitted to participate before the court in the trial or argument of any particular cause in which, for the time being, he is employed.

Although Rule 707 is the only regulatory provision challenged by appellants, Illinois Supreme Court Rule 756, Ill. Rev. Stat., 1973, 110A, § 756 (reprinted herein as Appendix A) is also involved in this appeal. Rule 756 concerns the various state requirements for the admission of attorneys seeking their initial license to practice law in Illinois, and of those attorneys seeking to be admitted upon a foreign license. Under this rule, any person who is not listed on the Master Roll on file with the Clerk of the Illinois Supreme Court is prohibited from the practice of law or from holding himself out as authorized to practice law in the State of Illinois.

B. The Proceedings Below.

Appellants are two railroad companies and five barge line companies operating in the State of Illinois. Prior to this litigation, certain attorneys have appeared as attor-

neys of record for appellants on a regular basis in Madison County, Illinois, and in the adjoining County of St. Clair, Illinois. These attorneys are not licensed to practice law in the State of Illinois, nor are they enrolled on the Master Roll of attorneys authorized to practice law in Illinois. Most, if not all, of the practice of law in Illinois by these attorneys has consisted of defending appellants in cases involving the Federal Employers' Liability Act (45 U.S.C. §51 et. seq.) and the Jones Act (46 U.S.C. §688).

In those cases, appellants' attorneys have participated as principal counsel, and their activities have included the preparation, settling or trying of various cases in which they have been involved. At the inception of this litigation, appellants' attorneys were attorneys of record in at least eighty cases pending in Madison County, Illinois. (See Exhibit A, attached to and incorporated in the "Amicus Curiae Brief of County Bar Association of Madison County, Illinois on the Merits" which was filed with the three-judge district court).

Pursuant to Illinois Supreme Court Rules 707 and 756, the Judges of the Circuit Court, Third Judicial Circuit, Madison County, Illinois, directed appellants to secure attorneys licensed to practice law in Illinois to serve as their principal counsel in those cases pending in the state courts of that county. In some instances, the Judges of the Third Judicial Circuit Court entered orders striking the names of the non-resident attorneys as counsel of record, while at the same time permitting appellants' out-of-state counsel to be associated in the cases with local counsel in a consulting or advisory role at trial.

Contending that Illinois Supreme Court Rule 707 is unconstitutional as applied to them, appellants instituted this action in the United States District Court for the

Southern District of Illinois, to enjoin the Judges of the Illinois Third Judicial Circuit from infringing upon their constitutional rights. By an order entered July 2, 1975, the three-judge district court held that Illinois Supreme Court Rule 707 was not constitutionally deficient as applied to appellants. The court denied appellants' request for an interlocutory or permanent injunction and dismissed plaintiffs-appellants' complaint. Appellants filed their Notice of Appeal on August 21, 1975.

Appellants have invoked the jurisdiction of this Court to review the decision of the three-judge district court by virtue of 28 U.S.C. § 1253.

II.

ARGUMENT

THE APPEAL IN THE PRESENT CASE SHOULD BE DISMISSED OR, IN THE ALTERNATIVE, THE DECISION OF THE DISTRICT COURT SUMMARILY AFFIRMED BECAUSE THE QUESTION PRESENTED IS SO INSUBSTANTIAL AS NOT TO REQUIRE FURTHER ARGUMENT AND THE DECISION BELOW IS SO OBVIOUSLY CORRECT AS NOT TO WARRANT FURTHER REVIEW.

Under our federal system of government, each State of the Union has traditionally established its own procedure for regulating the practice of law. It is well-settled that one of the powers not transferred to the federal government was the power to regulate the practice of law, *In re Lockwood*, 154 U.S. 116, 38 L. Ed. 929, 930 (1894), and that the primary responsibility for admission of members of the legal profession before the courts of a particular state belongs to that state. *In re Isserman*, 345 U.S. 286, 97 L. Ed. 1013, 1015 (1953). Recently, this Court emphasized the substantial interest of the individual states in generally regulating professions, and particularly in exercising control over the legal profession:

> We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions. We also recognize that in some instances the State may decide that "forms of competition usual in the business world may be demoralizing to the

> ethical standards of a profession." [Citations omitted.] The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been "officers of the courts." [Citations omitted.] In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the State to regulate its professions.

Goldfarb v. *Virginia State Bar*, 95 S. Ct. 2004, 44 L. Ed. 2d 572, 588 (1975).

In Illinois, as in a number of other jurisdictions, the power of the State to regulate the practice of law has historically been held to be vested in the judiciary branch of state government:

> The power to regulate and define the practice of law is a prerogative of the judicial department as one of the three divisions of the government created by article 3 of our Constitution. The legislative department may pass acts declaring the unauthorized practice of law illegal and punishable. Such statutes are merely in aid of, and do not supersede or detract from, the power of the judicial department to control the practice of law. In re Day, 181 Ill. 73, 54 N.E. 646, 50 L.R. A. 519; Rhode Island Bar Ass'n v. Automobile Service Ass'n (R.I.) 179 A. 139, 100 A.L.R. 226. The power is inherent in this court to prescribe regulations for the study of law and the admission of applicants for the practice of that profession. People v. People's Stock Yards State Bank, 344 Ill. 462, 176 N.E. 901; In re Day, supra. . . . The practice of law, both in courts and out of courts, by one not licensed, is an illegal usurpation of the privilege of an attorney and is a contempt of this court. People v. Chicago Motor Club, 362 Ill. 50, 199 N.E. 1; People v. Motorists Ass'n, 354 Ill. 595, 188 N.E. 827; People v. Ass'n of Real Estate Tax-Payers, 354 Ill. 102, 187 N.E. 823;

People v. People's Stock Yards State Bank, supra. *People* v. *Goodman,* 366 Ill. 346, 8 N.E. 2d 941, 944 (1937). See also *In re Teitelbaum,* 13 Ill. 2d 586, 150 N.E. 2d 873 (1958); *In re Anastaplo,* 3 Ill. 2d 471, 121 N.E. 2d 826 (1954), aff'd. 366 U.S. 82, 6 L. Ed. 2d 135 (1961). The Illinois Supreme Court, speaking per curiam in *Biggs* v. *Spader,* 411 Ill. 42, 103 N.E. 2d 104, 106 (1952), stated that not only did the Supreme Court have inherent power to prescribe rules of practice and procedure, but that such powers were expressly conferred by statute, so that such rules had the force of law.

Pursuant to this inherent power to regulate the practice of law, the Illinois Supreme Court first promulgated in 1938 what has become Illinois Supreme Court Rule 707, and the Rule has been in continuous force since that time. It is readily apparent that the inherent power of the Supreme Court of Illinois to prescribe rules and regulations for the practice of law within the state is meaningless unless, in situations like the present, the Court has the power to determine the circumstances under which an attorney may be permitted to appear and try law suits in the courts of the state.

A.

In F.E.L.A. and Jones Act Cases Brought Before A State Court, A Civil Litigant's Right To Counsel Is Subject To State Rules Regarding The Practice Of Law.

Essentially, appellants seek to obtain a decision that the existence of a federal question in any litigation automatically creates a corresponding federal right to retain non-resident counsel in both state and federal courts, regardless of whether such counsel is licensed to practice law in the jurisdiction in which the matter is being litigated. In particular, appellants contend that because the rights granted under the Federal Employers' Liability Act and the Jones Act are "federal rights," appellants may regularly engage the services of "specialist counsel" in the Illinois state courts, even though such counsel is not licensed by the State of Illinois.

There is no federal statute or constitutional provision which creates a right to engage an out-of-state attorney to advise on any federal law. Unquestionably, matters relating to the conduct of attorneys in federal court litigation are governed by federal standards, *Theard* v. *United States,* 354 U.S. 278, 1 L. Ed. 2d 1342, 1344 (1957), but such matters are traditionally governed by state standards when the litigation takes place in a state court.

Appellants attempt to equate the right to retain non-resident counsel with the substantive rights granted under the Federal Employers' Liability Act and the Jones Act. However, it is noteworthy that the "federal rights" created by these Acts are unique, in that they can be enforced in either the state or federal courts. Having conferred concurrent jurisdiction upon federal and state courts, Congress cannot be assumed to have intended to afford litigants the right to bring "specialist counsel" into a state court, even if they fail to qualify under local regulations. Rather, it seems obvious that the federal legislation has taken it for granted that suits brought under these federal statutes will be governed by the existing local federal and state rules, including state regulation relating to the retention of counsel appearing in these cases.

In most jurisdictions, including Illinois, out-of-state attorneys who are not licensed to practice within a particular state are admitted pro hac vice to argue a particular case before a state court. Appellants insist on far more

than this occasional accommodation by the state courts, by contending that their non-resident attorneys, who have been practicing law extensively in Illinois without an Illinois license, must be allowed to continue such practice, simply because a federal question is involved. This broad claim to a federal right to retain out-of-state counsel, despite state regulations, was rejected by the three-judge court below:

> . . . To view it otherwise would be for this Court to create a limited federal or national bar and to impose it on the states. To do so would be in total disregard of the state's great interests in the control and supervision of the practice of law in its own courts through reasonable requirements for licensing and admission.

See Appellants' Jurisdictional Statement, Appendix, p. 4.

There is nothing so complex in defending F.E.L.A. and Jones Act cases as to justify the abrogation of the Illinois Supreme Court's inherent power to regulate the practice of law within the state. Certainly the issues involved in these cases cannot be classified with such "esoteric subjects" as income taxation, patents, copyrights and the like which the court in *Spanos* v. *Skouras Theatres Corp.*, 364 F. 2d 161, 170 (2nd Cir. 1966), found to require the special expertise of non-resident attorneys in federal court litigation. Basically no more is involved in the cases pending against appellants in Madison County than the basic knowledge and application of ordinary legal concepts of negligence and contributory negligence. If appellants believe that these cases require special expertise, they can freely exercise their right to counsel of their choice by employing "specialist counsel" who are licensed to practice law by the State of Illinois, since appellants readily recognize the existence of competent counsel in Illinois:

> The plaintiff railroads freely and gladly acknowledge that there are competent law firms in Madison and St. Clair counties, Illinois, and throughout the entire State of Illinois who can try F.E.L.A. cases for plaintiffs and defendants. The plaintiff railroads have retained such law firms as chief counsel in numerous other cases now pending against them in Madison County and as co-counsel in the cases wherein defendants herein are threatening to strike the names of their attorneys not licensed in Illinois.

Plaintiff Railroads' Reply Brief, p. 4. See also Plaintiff Barge Lines' Reply Brief, p. 4.

It is readily acknowledged that state rules and regulations governing the practice of law are ultimately subject to the mandates of the United States Constitution and to federal regulations. In certain exceptional circumstances, particularly where civil rights have been involved, this Court has limited a state's power to regulate the practice of law. N.A.A.C.P. v. Button, 371 U.S. 415, 9 L. Ed. 2d 405 (1963); *Lefton* v. *City of Hattiesburg*, 333 F. 2d 280 (5th Cir. 1964). In addition, in *Sperry* v. *Florida ex rel. The Florida Bar*, 373 U.S. 379, 10 L. Ed. 2d 428 (1963), the Supreme Court held that registered specialists could practice before federal agencies without compliance with state regulations, since Congress specifically provided that patent applicants could be represented by an attorney or an agent authorized to practice before the Patent Office. However, the Supreme Court has not extended this rule beyond the federal agencies. Likewise, the Pennsylvania Supreme Court refused to extend this principle by holding that admission to practice before a federal district court does not give a person the right to practice generally within the district without being a member of a state bar. *Ginsburg* v. *Kovrak*, 392 Pa. 143, 139 A. 2d 889, appeal dismissed per curiam, 358 U.S. 52 (1958).

Appellants' reliance on *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 9 L. Ed. 2d 405 (1963), and *Brotherhood of Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar,* 377 U.S. 1, 12 L. Ed. 2d 89 (1964), is misplaced, since both of those cases involved an infringement of the constitutional guarantees of freedom of expression and association. Further, *Powell* v. *Alabama,* 287 U.S. 45, 77 L. Ed. 158 (1932), concerned the question of whether the defendant in a criminal case was adequately represented by counsel at all. Clearly, the Sixth Amendment right to counsel in criminal cases has never been extended to civil litigation simply because it involved a federal question.

The three-judge district court properly held that even if the particular factors present in the instant case might suggest the desirability of a more liberal exercise of discretion on the part of judges in Illinois, that question, as well as any modification of Illinois Supreme Court Rule 707 to accommodate similar circumstances, were matters for the state to decide.

B.

Illinois Supreme Court Rule 707 Is Not Unconstitutional As Applied To Appellants.

In addition to asserting a broad federal right to retain out-of-state counsel, appellants allege a number of constitutional grounds in support of their contention that Illinois Supreme Court Rule 707 is supposedly unconstitutional, as applied to them and their specialist counsel.

1. Appellants first maintain that Rule 707, as applied, violates the equal protection clause of the Fourteenth Amendment. Contrary to appellants' allegation that the application of the Rule has created a discriminatory classification between F.E.L.A. and Jones Act plaintiffs and defendants, Rule 707 has not been applied by appellees so as to protect the rights of plaintiffs in such cases to have out-of-state counsel, while denying defendants the same right. Most, if not all, of plaintiffs' lawyers in those cases, who are engaged in Madison County in litigation concerning appellants, are licensed by the State of Illinois, so that a separate classification which discriminates against appellants simply does not exist. It is purely speculative how appellees would have applied Rule 707 if the factual situation were otherwise.

Further, the fact that Rule 707 permits appellants' attorneys to try isolated cases, while prohibiting them from the practice of law in Illinois on a regular basis, does not constitute a violation of equal protection. The restrictions placed on out-of-state lawyers are based on far more solid grounds than a "parochial desire to eliminate outside competition." Jurisdictional Statement, p. 19. Clearly, the State of Illinois, acting through its Supreme Court, has a vital and compelling interest in maintaining high standards of ethics and competency among those who practice law within its borders.

The cases cited by appellants, even though some involve F.E.L.A. rights, wholly fail to support an equal protection violation. See *United Transportation Union* v. *State Bar of Michigan,* 401 U.S. 576, 28 L. Ed 2d 339 (1971); *United Mine Workers* v. *Illinois State Bar Association,* 389 U.S. 217, 19 L. Ed. 2d 426 (1967); *Brotherhood of Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar,* 377 U.S. 1, 12 L. Ed. 2d 89 (1964). None of those decisions suggest that an attorney for either a plaintiff or a defendant in a F.E.L.A. or Jones Act case, which is filed in a state court, may regularly practice law in that court without being licensed by the state in which the action is pending.

2. Appellants next maintain that Illinois Supreme Court Rule 707, as applied, violates the due process clause of the Fourteenth Amendment. However, the application of Rule 707 clearly does not interfere with appellants' right to counsel, so as to deprive them of a fair hearing.

As previously noted, there are numerous attorneys licensed in the State of Illinois who can competently represent appellants in the state courts. Rule 707 is not an arbitrary ban on out-of-state counsel, since unlicensed attorneys are allowed to appear before Illinois courts in particular cases in which they are employed. Further, while appellants' attorneys cannot act as principal counsel in the cases pending in Madison County, as noted by the three-judge district court below, these attorneys may freely act in an advisory capacity.

Appellants' reliance on *Powell* v. *Alabama*, 287 U.S. 45, 77 L. Ed. 158 (1932), and *United States* v. *Bergamo*, 154 F. 2d 31 (3rd Cir. 1946), to support a due process violation is ill placed. Both of these cases involved the appearance of an attorney in an isolated case, and in no way pertained to the regular practice of law by out-of-state attorneys in civil litigation.

The Supreme Court in *Powell* stated that federal or state courts, in civil and criminal cases, cannot *arbitrarily* refuse to hear a party by counsel employed by him, and that such refusal would be a denial of a hearing and of constitutional due process. The concept of "counsel," as used in *Powell*, implies the requirement that an attorney be licensed to practice before the court where the case is being litigated. In addition, the use of the term "arbitrarily" in the opinion presumes that reasonable restrictions may be placed upon a litigant's right to choose his own counsel. It cannot be seriously maintained that appellees acted arbitrarily in exercising their discretion under Rule 707 so as to prohibit appellants' attorneys from continuing the extensive practice of law in Illinois without a license.

3. Appellants aver, solely on the basis of the decision in *Spanos* v. *Skouras Theatres Corp.*, 364 F. 2d 161 (2d Cir. 1966), that Illinois Supreme Court Rule 707, as applied, violates the privileges and immunities of appellants and their specialist counsel. However, that case is readily distinguishable from the instant case.

In *Spanos*, an out-of-state attorney sought to collect a fee for services rendered in a Sherman Act suit which had been litigated in a federal court. The issue in *Spanos* was adequately resolved by the application of simple contract law and, as noted by the three-judge court below in the present case, much of the language relied on by appellants was unnecessary to the decision.

Further, the court in *Spanos* simply stated that out-of-state attorneys should be allowed to appear in a federal court when a case involved "such esoteric subjects" as "income taxation, patents, copyrights, trademarks, and securities and labor regulation." *Id.* at 170. The court did not include F.E.L.A. and Jones Act cases, as appellants contend, in the category of "esoteric subjects" because they are not, in fact, esoteric. The parameters of the power of the *federal court* to regulate the conduct of attorneys who appear before it, as defined in *Spanos*, are not determinative of the extent of the state court's inherent power to regulate the practice of law by attorneys who appear before it.

4. Finally, appellants claim that Illinois Supreme Court Rule 707, as applied, violates the United States Constitution by placing an undue burden on interstate commerce. This contention implies that any of the myriad activities in to-

day's world which involve interstate commerce generate the right to employ out-of-state counsel solely on that basis. A finding in favor of such a contention would almost completely obliterate the state's power to exercise control over who practices law within its borders.

It is difficult to understand how the exercise by the Illinois Supreme Court of its inherent power to regulate the practice of law within the State of Illinois is an activity in interstate commerce, or how it affects interstate commerce. Even if appellants' contentions were to be put into actual realization, the effects of interstate commerce could only be de minimus and purely incidental.

In this regard, this Court has stated:

> Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. Huron Cement Co. v. Detroit, 362 U.S. 440, 443, 4 L. Ed. 2d 852, 856, 80 S. Ct. 813, 78 ALR 2d 1294. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. . . .

Pike v. *Bruce Church, Inc.*, 397 U.S. 137, 25 L. Ed. 2d 174, 178 (1970).

Clearly, the state has a very substantial interest in regulating the practice of law within its confines which by far outweighs any incidental burden imposed upon appellants in securing the services of competent licensed Illinois attorneys.

CONCLUSION

For all these reasons appellees respectfully submit that the question upon which this cause is presented is so insubstantial as not to require any further argument and that the decision below is so obviously correct as not to warrant any further review. Appellees, therefore, respectfully move this Honorable Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in this cause by the United States District Court for the Southern District of Illinois, Southern Division.

Respectfully submitted,

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APPENDIX

APPENDIX

756. (Supreme Court Rule 756). Registration and Fees

(a) Except as hereinafter provided, every attorney admitted to practice law in this State shall pay an annual registration fee to the Attorney Registration Commission. The first annual registration fee shall be for the year 1973 and shall be paid on or before April 1, 1973. Thereafter the annual registration fee shall be paid on or before the first day of January of each year. Until further order of the Court, the following schedule shall apply:

(1) As to the first annual registration fee, none is required of any attorney admitted to the Bar after January 1, 1972; an attorney admitted to the bar after January 1, 1968, but before January 1, 1972, shall pay an initial registration fee of $10.00; an attorney admitted to the Bar before January 1, 1968, shall pay an initial registration fee of $20.00.

(2) As to subsequent annual registration fees, none is required of any attorney admitted to the Bar less than one year before the first day of January for which the registration fee is due; an attorney admitted to the Bar for more than one year but less than 5 years before the first day of January for which the registration fee is due, shall pay an annual registration fee of $10.00; an attorney admitted to the Bar for more than 5 years before the first day of January for which the registration fee is due, shall pay an annual registration fee of $20.00

(3) An attorney in the Armed Forces of the United States shall be exempt from paying a registration fee until the first day of January next following his return to civilian life.

(4) Upon making a written application to the Attorney Registration Commission, an attorney licensed to practice for more than 50 years or who has reached the age of 75 years shall be excused from the further payment of registration fees.

(5) For purposes of the foregoing provisions, the time shall be computed from the date of an attorney's initial admission to practice in any jurisdiction in the United States.

(6) An attorney licensed to practice in this State, but who neither resides nor practices nor is employed in this State, shall be exempt from paying a registration fee.

(7) Upon written application and for good cause shown, the Administrator may excuse the payment of any registration fee in any case in which payment thereof will cause undue hardship to the attorney.

(b) The Administrator shall prepare an initial Master Roll of Attorneys consisting of the names of attorneys who have paid or are exempt from paying the registration fee and shall file in the office of the clerk of the Court a copy of the Master Roll thus prepared. Thereafter the Administrator shall maintain the Master Roll in a current status, a copy of which shall at all times be on file in the office of the clerk of the Court. No person who is not listed on the current Master Roll on file in the office of the clerk of the Court shall be entitled to practice law or to hold himself out as authorized to practice law in this State.

(c) On or before February 1, 1973, the Administrator shall mail to each attorney on the Master Roll a notice that the registration fee for 1973 will be payable on or before April 1, 1973. On or before the first day of November of each year commencing November 1, 1973, the Administrator shall mail to each attorney on the Master Roll a notice that the annual registration fee will be payable on or before the first day of January of the following year.

(d) It is the responsibility of each attorney on the Master Roll to notify the Administrator of any change of address. Failure to receive the notice from the Administrator shall not constitute an excuse for failure to pay the annual registration fee. The name of any person who has not paid the current annual registration fee shall be removed from the Master Roll when his delinquency shall have continued for 90 days beyond the due date of the fee. Any person whose name is not on the Master Roll and who practices law or who holds himself out as being authorized to practice law in this State is engaged in the unauthorized practice of law and may also be held in contempt of the Court.

(e) An attorney whose name has been removed from the Master Roll solely for failure to pay the registration fee may be reinstated as a matter of course upon paying the registration fee prescribed for the period of his suspension, plus the sum of $3.00 per month for each month that such registration fee is delinquent.

Adopted Jan. 25, 1973, effective Feb. 1, 1973. Amended and effective May 17, 1973.

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Appellees.

On Appeal From the United States District Court for the Southern District of Illinois, Southern Division

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

Appellants' position on the merits is adequately set forth in the jurisdictional statement. This brief is submitted to clarify the questions presented, by replying to statements or omissions which, we believe, are misleading and appear to broaden the issues before this Court.

1. **Nature of Litigation and Legal Services.**

Appellees present a partial and, accordingly, inaccurate description of the nature of the litigation involved. They note:

> "At the inception of this litigation, appellants' attorneys were attorneys of record in at least eighty cases pending in Madison County, Illinois." (Motion to Dismiss, p. 4).

However, they fail to state that:

A. The eighty cases represent an accumulation of suits brought over a period of several years to enforce rights under federal statutes (F.E.L.A., Safety Appliance Acts, or Jones Act) or under admiralty law.

B. In every case, appellants' counsel represent the defendant and not the party who initiated the suit. The Madison County Circuit Court is a favored plaintiff's forum for F.E.L.A. and Jones Act cases (Jurisdictional Statement, page 13).

C. In every case, an Illinois licensed attorney has been employed as local counsel and appears at all stages of the proceeding.

In the same manner, the nature of the legal services performed by appellants' non-resident specialist counsel, at times, is referred to in broad terms. At the outset, appellees state:

> "Most, if not all, of the practice of law in Illinois by these attorneys has consisted of defending appellants in cases involving the Federal Employers' Liability Act (45 U.S.C. § 51 et seq.) and the Jones Act (46 U.S.C. § 688)." (Motion to Dismiss, p. 4).

Appellees' argument (involving Illinois Supreme Court Rule 756 on the admission of attorneys to practice law) that appellants' counsel are engaged in the general practice of law in the state is not responsive to the issues raised in the jurisdictional statement. Appellants' non-resident specialist counsel do not engage in the general practice of law in Illinois, and do not seek to do so. Their practice in Illinois is limited to, and

consists solely of, legal services rendered in suits brought against their clients under the federal statutes referred to above. Illinois Supreme Court Rule 756 is not involved.

2. **Competence of Illinois Lawyers.**

From the beginning, appellees, as well as the state and county bar associations, have viewed this case as an attack on the general practice qualifications of Illinois lawyers. Predictably, their response has been two-fold: an insistence that Illinois lawyers are competent and that, in any event, one does not need to know much more than common law to be an admiralty or F.E.L.A. lawyer. Appellees state there is nothing "complex" or "esoteric" about defending F.E.L.A. or Jones Act cases:

> "Basically no more is involved in the cases pending against appellants in Madison County than the basic knowledge and application of ordinary legal concepts of negligence and contributory negligence." (Motion to Dismiss. p. 10).

The competence of Illinois lawyers is not an issue in this case. Illinois has a distinguished bar. However, a professional relationship should be initiated by the client, rather than the bar or the court, and is, in large part, based upon the trust and confidence of the client in his attorney. When a party successfully asserts the right to be represented by counsel of his choice, neither the claim nor the ruling in his favor disparages the state or local bar. The decisions of this Court—that a California defendant has a right to represent himself, if he wishes (*Faretta v. California*, 95 S. Ct. 2525 (1975), or that the State of Virginia cannot, under the Constitution, apply its statutes against champerty or solicitation to outlaw a union plan for regional attorneys to represent their member F.E.L.A.

claimants (*Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964); (Jurisdictional Statement, p. 13)—constitute no reflection upon the qualifications of the California or Virginia bar. It goes without saying that the ruling of the Second Circuit—upholding the right of a California specialist anti-trust attorney to recover compensation for legal services rendered in New York, notwithstanding a New York statute making unlawful such activity without a New York license (*Spanos v. Skouras Theatres Corp.*, 364 F.2d 161 (1966), Jurisdictional Statement, p. 17)—does not represent a finding that there are no qualified anti-trust lawyers in New York.

Appellees' statement that "ordinary legal concepts of negligence and contributory negligence" apply in F.E.L.A. and Jones Act cases has not been true for over fifty years. Those concepts have been made inapplicable by statute (45 U.S.C. §53) and by the decisions of this Court (Jurisdictional Statement, pp. 11, 13). Moreover, unseaworthiness, which almost invariably is included as the second count in a plaintiff's complaint for damages under the Jones Act, is not based upon ordinary legal concepts of negligence and contributory negligence, but is based upon admiralty law.

No useful purpose would be served by a discussion of whether or not the branch of the law here involved, as to federal rights, is more or less complex or esoteric than labor or other branches of the law. That cases of this type involve special federal problems is emphasized by the fact that the Department of Justice has a separate Admiralty and Shipping Section; and admiralty law is one of the few specialties recognized by the American Bar Association (Code of Professional Responsibility, DR2-105). For the bar to keep pace with the needs of society, increased specialization is required.

3. **Power of State to Regulate.**

It is true, as appellees assert, that the State of Illinois "has a vital and compelling interest in maintaining high standards of ethics and competency among those who practice law within its borders" (Motion to Dismiss, p. 13). No one in this case suggests otherwise. However, it should be noted:

A. The record affirmatively indicates, and includes testimony by appellees, that the handling and trial of cases in Madison County by appellants' specialist counsel meet those standards.

B. Based upon Appellees' argument and a reading of Section 707, a non-resident lawyer trying his first case in Illinois would be allowed to do so, without local counsel, even though appellees have no knowledge of his competence or ethical practices.

Nevertheless, the power of a state to regulate the practice of law is limited by the Constitution, particularly by the Supremacy Clause (Article VI) and the Fourteenth Amendment. Illinois is part of a federal system. F.E.L.A. and Jones Act suits (of resident or non-resident plaintiffs, for accidents occurring anywhere in the United States) can be imported into the Madison County Circuit Court only because Congress, in creating the federal right, so provided.

It will not do for Appellees to assert that:

> "It seems obvious that the federal legislation has taken it for granted that suits brought under these federal statutes will be governed by the existing local federal and state rules . . ." (Motion to Dismiss, p. 9).

This statement, like appellees' comment that "ordinary concepts of negligence and contributory negligence" are applicable in F.E.L.A. and Jones Act cases (Motion to Dismiss, p. 10), can only be made by one who has not read—or prefers to ignore

—the decisions of this Court. (Jurisdictional Statement, pp. 10-12). Those decisions hold that a state lacks power to apply any of its rules—whether termed procedural or substantive—which affect or impair the federally created right. As the Court stated in *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 7:

> "A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest, and . . . of course, lawyers accepting employment under this constutitionally protected plan have a like protection which the State cannot abridge."

Thus, the State of Illinois has a vital interest and substantial power to regulate fraudulent agreements and to bar stale claims; but this Court has held that it cannot apply its statute of frauds or statute of limitations or doctrines regarding the validity of releases to F.E.L.A. or Jones Act claims (*Kossick v. United Fruit Co.*, 365 U.S. 731 (1961); *McAllister v. Magnolia Petroleum Company*, 357 U.S. 221 (1958); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942); Jurisdictional Statement, p. 11). Illinois has a great interest and the power to regulate the rules of pleading and practice in its state courts; but it cannot apply those rules of pleading to impair the rights of an F.E.L.A. or Jones Act plaintiff (*Brown v. Western Railway of Alabama*, 338 U.S. 294 (1949)). Appellees do not discuss, and make no effort to distinguish, these cases.

There is no merit to the assertion that, unless appellees' order is upheld, the power of a state to regulate the practice of law within the state "is meaningless" (Motion to Dismiss, p. 8). The power of the state to regulate, in connection with its statute of frauds or limitations or doctrines regarding releases has not been rendered meaningless because it cannot apply those rules to F.E.L.A. or Jones Act cases. The power of a state to

regulate the practice of law has not been rendered meaningless because this Court has required states to comply with the Constitution of the United States. (Jurisdictional Statement, pp. 12, 16) Large areas remain for proper state regulation.

The decisions of this Court leave no doubt that the right to the assistance of counsel is basic in our adversary system of justice. The classic statement by Justice Sutherland, in *Powell v. Alabama*, 287 U.S. 45, 69 (1932), repeatedly quoted with approval in later opinions, indicates why this is so. Even the intelligent and educated layman has little knowledge of the law and is unfamiliar with the rules of evidence. Without the guiding hand of counsel, in proceedings against him, even if his case is just, his adversary may prevail. The same reasoning is, of course, applicable to civil, as well as criminal cases; and Justice Sutherland expressly included civil cases in his statement that a refusal by a Court "in any case, civil or criminal . . . to hear a party by counsel employed by and appearing for him" would be a denial of due process in the constitutional sense (Jurisdictional Statement, p. 15).

Appellees are in error when they state:

> "The concept of 'counsel', as used in Powell, implies the requirement that an attorney be licensed to practice before the court where the case is being litigated". (Motion to Dismiss, p. 14).

The party may have no license to practice law and appear pro se (*Faretta v. California*, 95 S. Ct. 2525 (1975)); he may be represented by a specialist who is not a licensed attorney (*Sperry v. Florida, ex rel. The Florida Bar*, 373 U. S. 379 (1963)); or he may be represented by an attorney who has not been authorized to practice before the court involved (*U. S. v. Bergamo*, 154 F2d 31 (3rd Cir. 1946)); *Lefton v. City of Hattiesburg*, 333 F 2d 280 (5th Cir. 1964).

However, for purposes of this case, all that is required to support the position of appellants is the finding that the order issued by appellees—preventing appellants from having their F.E.L.A. and Jones Act cases tried by counsel of their choice—affects or impairs a federal right. Appellants submit that the *Kossick, McAllister, Garrett* and *Brown* cases cited above require such a result. If impairment of the federal right occurs when a state applies its rules of pleading, statute of frauds, statute of limitations, or doctrine regarding the validity of releases to F.E.L.A. or Jones Act claims, a much greater impairment would result if a court were "to refuse to hear a party by counsel employed and appearing for him," as appellees have done in this instance.

Although appellees attempt to distinguish the union cases cited by appellants, the fact is that this Court did refuse to permit the application of state laws forbidding solicitation and unauthorized practice of law to a labor union program of recommending F.E.L.A. attorneys to members and their families (Jurisdictional Statement, p. 16); *United Transportation Union v. State Bar of Michigan,* 401 U.S. 576 (1971); *United Mine Workers v. Illinois State Bar Association,* 389 U.S. 217 (1967); *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar,* 377 U.S. 1 (1964). The plan, which received judicial sanction, involved an approved list of regional or out-of-state counsel for F.E.L.A. claimants and contemplated a regular—not an isolated program of representation. And the Court further held:

> "and, of course, lawyers accepting employment under this constitutionally protected plan have a like protection which the state cannot abridge" (377 U.S. 1, 8).

It is not unreasonable to assume that many of the union F.E.L.A. claimants, in fact, employ the union recommended lawyers and that these regional lawyers file and try F.E.L.A. cases in various states in their region in which they are not licensed. We do not

believe that a court would be permitted, in a case in which local counsel had been employed, to bar non-resident-specialist F.E.L.A. or Jones Act or admiralty counsel for a plaintiff from trying the case. With deference, we submit that, under our system, it can make no difference that appellees' order was directed against counsel for defendants, rather than counsel for plaintiffs. The impairment of rights is the same in both cases.

With reference to *Spanos v. Skouras Theatres Corp.*, 364 F 2d 161, cert. denied, 385 U.S. 987 (1966) (Jurisdictional Statement, p. 17), appellees attempt to distinguish the case on the ground that it involved only the application of contract law. However, the law is clear that a party cannot recover on an agreement which runs contrary to the strong public policy of the state in which suit is brought. Accordingly, in ruling for plaintiff, the court necessarily held that the state statute, condemning the unlicensed practice of law, could not be applied in connection with the federal rights involved in that case.

It is clear that the injunction sought by appellants should be granted, to prevent the State of Illinois from denying appellants the constitutional right to have counsel of their choice try the cases brought against them in the State of Illinois, wherein federally created rights are asserted against them, with Illinois licensed attorneys appearing as local counsel.

CONCLUSION

Basic constitutional rights of great importance are involved in this case. They require plenary consideration, with briefs on the merits and oral argument.

Respectfully submitted

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